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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1904

DIGILAB, INC. and
GUILLERMO FERLA,
PETITIONERS,

v.

THE SECRETARY OF LABOR and
LAWRENCE W. ROGERS,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

TO THE HONORABLE THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, Digilab, Inc. and Guillermo Ferla, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled cause on March 22, 1974.

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit, as yet unreported, is set forth in full in the Appendix hereto at page 16. The opinion of the United States District Court for the District of Massachusetts denying the respondents summary judgment, as yet unreported, and the opinion of the said District Court granting the petitioners summary judgment, reported at 357 F. Supp. 941, are set forth in full in the Appendix hereto at page 22.

Jurisdiction

Petitioners brought this action against Respondents seeking declaratory judgment under 28 U.S.C., section 2201 and judicial review under the Administrative Procedure Act, 5 U.S.C. sections 704, 705, and 706.

Jurisdiction of this Honorable Court is invoked under 28 U.S.C. section 1254 (1), and pursuant to Supreme Court Rule 19, Section 1, subparagraph (b) on the grounds that the decision of the Court of Appeals is in conflict with the decision of another Court of Appeals on the same matter and that the Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Honorable Court.

Questions Presented for Review

1. Is the labor certification process, 8 U.S.C. section 1182 (a) (14), committed to agency discretion by law in such a way as to remove from the scope of the Administrative Procedure Act, thereby denying the applicant the right to judicial review?

2. After the applicant has fully exhausted his administrative remedies, if the reviewing court, finds that the

Secretary has abused his discretion in denying labor certification, may the court direct the agency to issue labor certification or must it remand to the agency for further administrative proceedings?

3. Can the Secretary fulfill his affirmative duty to pass on applications for labor certification without making a supportable finding that American workers are "able, willing, qualified, *and* available", 8 U.S.C. section 1182 (a) (14) (emphasis supplied) for the position which the applicant seeks?

Statutes Involved

The statutes involved are the labor certification section of the Immigration and Nationality Act, 8 U.S.C. section 1182 (a) (14) and the judicial review sections of the Administrative Procedure Act, 5 U.S.C. sections 704, 705, and 706. The relevant sections of both statutes are set out in Petitioners' Appendix.

Statement

Guillermo Ferla, a native of Uruguay, entered this country on a student visa and studied for a masters degree in electrical engineering at the Massachusetts Institute of Technology. He is seeking to become a special immigrant under Section 101 (a) (27) (A) of the Immigration and Nationality Act as amended 8 U.S.C. § 1101 (a) (27) (A). Digilab, Inc., is a designer, manufacturer, and distributor of digital equipment with its principal place of business in Cambridge, Massachusetts. In the Summer of 1971, Ferla worked on a temporary basis as a senior engineer for Digilab, returning to school in the Fall. During the Summer, a permanent position was discussed and on September 23, 1971, Digilab confirmed its

offer in writing. On October 26, 1971, Digilab filed a notice of a job offer to an alien with the Massachusetts Division of Employment Security. On the same day, Ferla submitted to that agency a statement of his qualifications for the job.

Digilab required an electrical engineer with a B.S. and M.S. and with 4 to 6 years experience or 10 years in a related occupation. His duties would include designing, testing, and analyzing Digilab's equipment, plus traveling whenever field service of the equipment is required. The salary was fixed at $15,000.00 per year. Digilab advertised in the Boston Globe and interviewed may applicants, but was unable to find a suitable legal resident worker.

On November 8, 1971, the Massachusetts Division of Employment Security evaluated the application and job offer on the basis of the occupational title and job code, i.e. electrical engineer, D.O.T. 003.081. Utilizing information provided by the Bureau of Labor Statistics, it concluded that the rate of pay was equal to the prevailing wage. However, it advised that United States workers were available in this occupation and explained that the employer's failure to hire any of them resulted from three factors: (1) the employer's opinion that Ferla was the only person qualified, (2) the background and experience specified by the employer, and (3) the unique character of the duties.

On November 15, 1971, the Certifying Officer denied certification and notified Digilab of its decision. The notification contained the following explanation:

> "On the basis of information available to us, we cannot issue the certification required by section 212 (a) (14) of the Immigration and Nationality Act, as amended. Reason: Available job market information

will not warrant a certification of unavailability of workers in the United States."

On January 13, 1972, Digilab requested an appeal. On January 31, 1973, the Reviewing Officer upheld the decision of the Certifying Officer and denied certification on the basis of the availability of United States workers. In a letter to Digilab, the Reviewing Officer explained that he had given "careful consideration of all factors involved" and there were not "sufficient grounds upon which to base a reversal." He further explained that the National Registry for Engineers, a federally funded national recruitment center for technical personnel, reported an excess of over 200 electrical engineers ranging from B.S. to Ph.D. He advised Digilab to contact the Massachusetts Division of Employment Security and that that agency would then put Digilab in contact with the National Registry.

In its decision of May 4, 1973, the District Court interpreted section 212 (a) (14) of the Act, 8 U.S.C. section 1182 (a) (14), as requiring a determination by the Regional Manpower Administrator that there are sufficient workers in the United States who are *able, willing, qualified* and *available* (emphasis added) at the time of the application and for the particular employer. The District Court found an abuse of discretion by the Regional Manpower Administrator because data supplied by the National Registry was not, by itself, sufficient evidence to make a finding of availability for the Digilab job offer.

The Court of Appeals in its decision dated March 22, 1974, remanded the case to the federal respondents for "a more specific factual basis for their decision" without ruling on the District Court's findings of an abuse of discretion by the Regional Manpower Administrator.

Reasons for Granting the Writ

I. Conflict Exists Among the Circuits as to the Degree of Discretion Vested in the Secretary of Labor for Purposes of Labor Certification and, Consequently, as to the Applicability of the Administrative Procedure Act to the Certification Process.

Petitioners sought judicial review before the district court under the Administrative Procedure Act, 5 U.S.C. sections 704, 705, and 706, of the Regional Manpower Administrator's denial of labor certification. Respondents, in support of their motion for summary judgment, argued that the labor certification procedure, 8 U.S.C. § 1182 (a) (14), is committed to agency discretion by law and is therefore excepted from the judicial review provisions of the Administrative Procedure Act by section 701 (a) (2) of that act. ("This chapter applies, according to the provisions thereof, except to the extent that . . . (2) agency action is committed to agency discretion by law.") The district court, in denying defendants' (respondents') motion for summary judgment and again in granting plaintiffs' (petitioners') motion in kind, implicitly accepted jurisdiction under the Administrative Procedure Act. The Court of Appeals, since it noted petitioners' reliance upon the Act and did not refute it, and since it found the Secretary's discretion to be less than absolute, apparently that judicial review was available under the Administrative Procedure Act. Other federal courts have not uniformly reached the same conclusion, although it is the result in accord with this Court's decisions on analogous matters.

As this Court itself has noted, a survey of Supreme Court cases shows that judicial review of final agency action will not be cut off unless there is a persuasive

reason to believe that such was the purpose of Congress. *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 140 (1967). *Accord, Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 410 (1971). The Administrative Procedure Act embodies a basic presumption of administrative review, and "exemptions from the terms of the Administrative Procedure Act are not lightly to be presumed in view of the statement in section 12 of the Act that modifications must be express." *Marcello* v. *Bonds,* 349 U.S. 302 (1955). Nor has the Court hesitated to carry this presumption in favor of judicial review into the immigration area. Under the 1952 version of the Immigration and Nationality Act, which included no provision for judicial review of deportation proceedings, the Court held that section 10 of the Administrative Procedure Act guaranteed the right of judicial review to parties aggrieved by agency action, and that the word "final" in reference to deportation decisions in the 1952 Act should be read *in conjunction with the Administrative Procedure Act,* as referring to finality in the administrative procedure. *Shaughnessy* v. *Pedeiro,* 349 U.S. 48 (1955). Sections 10 and 12 of the Administrative Procedure Act were similarly held by the Court to guarantee judicial review of exclusion orders, where no such review was provided in the Immigration Act itself. *Brownell* v. *Tom We Shung,* 352 U.S. 180 (1956).

Nothing in the immigration statute or its legislative history indicates that Congress intended to preclude judicial review of labor certification process, which was added to the Act in 1965 to afford more affirmative protection to American workers, *U. S. Code Con. and Ad. News,* 89th Congress, 1st Session (1965) at 3333, but not to allow the Secretary to diminish immigration below levels authorized by law. Remarks of Senator Kennedy, 111 Congressional Record 24227, as cited in *Ozbirman* v.

Regional Manpower Administrator, 335 F. Supp. 467, 471 (S.D.N.Y. 1971). Although an express statement of Congressional purpose to exclude judicial review is the standard which this Court has found sufficient to rebut the strong presumption in favor of review, respondents attempted to argue the permissive/mandatory dichotomy in their brief to the Court of Appeals (at p. 12). That test, developed in a few lower courts, suggests that courts may review agency action where the enabling statute makes such action "mandatory", but not where the statutory language is "permissive". *Knight Newspapers, Inc.* v. *United States,* 395 F.2d 353 (6th Cir. 1968); *Ferry* v. *Udall,* 336 F.2d 706 (9th Cir. 1964). Contrary to respondents' argument, petitioners contend that the statutory directive to issue labor certification is in fact mandatory once the requisite conditions in the American labor market are found. For purposes of this petition, however, of greater significance is the existence of this less stringent test for exclusion of review in some jurisdictions and its absence from others.

Using one or both of the above tests, federal courts have reached conflicting conclusions on whether or not the Administrative Procedure Act guarantees judicial review of the labor certification process. As mentioned above, the courts in the case at bar implicitly accepted jurisdiction under the Administrative Procedure Act. The Court of Appeals for the Seventh Circuit recently reached the same conclusion, *Secretary of Labor* v. *Farino,* 490 F.2d 885 (7th Cir. 1973); *Cf. Song Jook Suk* v. *Rosenberg,* 437 F.2d 1098 (9th Cir. 1971); *Estrada* v. *Ahrens,* 296 F.2d 690 (5th Cir. 1961). At the district court level as well, the Administrative Procedure Act has been held applicable to labor certification. *Bitang* v. *Regional Manpower Administrator,* 351 F. Supp. 1342 (N.D. Ill. 1972); *Wang* v. *Regional Manpower Administrator,* 352 F. Supp. 260

(N.D. Ill. 1972). *See also Golabek* v. *Regional Manpower Administrator,* 329 F. Supp. 892 (E.D. Pa. 1971), in which a denial of labor certification was held to be judicially reviewable, although the Administrative Procedure Act was not expressly relied upon. *Cf. Hom Sin* v. *Esperdy,* 239 F. Supp. 903 (S.D. N.Y. 1965) (INS denial of classification as first preference immigrant held judicially reviewable). In conflict with these decisions is the conclusion reached by the Court of Appeals for the Fifth Circuit in *Cobb* v. *Murrell,* 386 F.2d 947 (5th Cir. 1967), in which the Court held that a would-be employer of an applicant denied certification had failed to state a claim within the jurisdiction of the Court because the certification procedure was committed to agency discretion and thus excluded from Administrative Procedure Act coverage. Although not specifically mentioning the Administrative Procedure Act, the Court of Appeals for the Ninth Circuit has similarly denied aliens the right of judicial review because the court was not expressly authorized by law to review a determination of the political branch to exclude given aliens. *Braude* v. *Wirtz,* 350 F.2d 702 (9th Cir. 1965). Such a standard, of course, is in direct contravention of the presumption in favor of judicial review and only serves to confuse further administration of the immigration laws.

The decision as to whether or not the Administrative Procedure Act is applicable is not merely academic since it can have significant ramifications. The most obvious is that the Administrative Procedure Act coverage *guarantees* the right to judicial review, while review of an agency action deemed purely discretionary is, at best, at the discretion of the reviewing court. It is a long-settled principle of administrative law that courts will review discretionary agency actions only with caution. *See generally Davis., Administrative Law,* chapter 28. In fact,

in the labor certification area, a few courts have gone so far as to hold that they had *no* power to review the Secretary's decision under any standard, *Ferry* v. *Udall,* 336 F.2d at 711; *Braude* v. *Wirtz,* 350 F.2d at 705; *Cobb* v. *Murrell,* 386 F.2d at 949. At least one district court has been willing to engage in very limited review even after holding the Administrative Procedure Act inapplicable, *Ozbirman* v. *Regional Manpower Administrator,* 335 F. Supp. 467; and the Court of Appeals for the Sixth Circuit likewise did so under a similar statute unrelated to the immigration area, *Knight Newspapers, Inc.* v. *United States,* 395 F.2d at 359. Respondents, while arguing that the Administrative Procedure Act was inapplicable, have conceded jurisdiction for review as to possible abuse of discretion; but past case law indicates that the applicant cannot rest assured of such a concession. Denial of applicability of the Administrative Procedure Act leaves the alien and his potential employer with a tenuous privilege as compared with the Administrative Procedure Act's ironclad right. The standard of review under the Administrative Procedure Act in cases of this nature, as with the limited review held possible in some jurisdictions without the Administrative Procedure Act, would be to overturn agency action which was an abuse of discretion; but that standard would be applied in every case where denial of certification was challenged.

A second significant difference arising from the decision to apply the Administrative Procedure Act or not to do so, concerns the procedure to be followed by the reviewing court once an abuse of discretion has been found. Pursuant to section 706 (1) of the Administrative Procedure Act, the Court may itself compel the agency to perform the requested action (e.g., issuance of labor certification). In a case involving purely discretionary administrative action, on the other hand, the courts will invariably direct

that the matter be reconsidered by the administrative authorities, with no right to a hearing de novo before the court. Gordon & Rosenfield, *Immigration Law and Procedure*, Section 8.14.

II. The Decision of the Court of Appeals to Remand for Further Agency Proceedings Rather than to Allow the District Court Order to Stand Presents an Important Question of Federal Law, Bearing on the Administration of Our Immigration Laws, Which Has Not Been, But Should Be, Settled by This Court.

In the case at bar, the district court ordered the Regional Manpower Administrator to issue labor certification to petitioner Ferla. While the Court of Appeals did not hold that this was in error, it chose to remand to the district court with a direction to return the case to respondents for "a more specific factual basis for their decision." A similar pattern occurred in the Seventh Circuit case of *Secretary of Labor* v. *Farino*, 490 F.2d at 891-92, and the Court specifically addressed the issue of whether a trial de novo was acceptable or an agency remand required. It concluded that the district court has the judicial power to use either procedure, and that the decision was one of judicial policy. The opinion of the Court of Appeals was that, in alien employment certification proceedings, remand to the agency is the better practice. *Accord Bitang* v. *Regional Manpower Administrator*, 351 F. Supp. at 1346; *Ozbirman* v. *Regional Manpower Administrator*, 335 F. Supp. at 472; *Guinto* v. *District Director of the United States Immigration and Naturalization Service*, 303 F. Supp. 1094, 1102 (C.D. Calif. 1969), aff'd 446 F.2d 11 (9th Cir. 1970). On the other hand, the district court in *Golabek* v. *Regional Manpower Adminis-*

tration, 329 F. Supp. 892 (E.D. Pa. 1971), like the lower court in the instant case, chose the route of granting the applicant's counter-motion for summary judgment after denial of labor certification, without remanding for further administrative proceedings. Under section 706(1) of the Administrative Procedure Act, the more direct route is certainly available to those courts which have taken jurisdiction under the act. Even the courts which choose to remand in the first instance would apparently allow the court to compel agency action if discretion is again abused. *Secretary of Labor* v. *Farino,* 490 F.2d at 892.

Where both procedures are possible and the decision is one of judicial policy, a choice should be made by this Court to ensure uniform administration of the certification procedure. In those circuits where the Court of Appeals have ordered remand to the agency, the applicant is left with uncertainty as to when the administrative route is completed, since ostensible "exhaustion of administrative remedies" will not entitle him to judicial determination, even where the Administrative Procedure Act is held applicable. Elsewhere, applicants are able to obtain judicial review when they have completed the administrative appeals provided in the statute. Uniformity in administrative finality and in entitlement to judicial review can only be obtained through a decision of this court.

III. The Statutory Interpretation of the "Able, Willing, Qualified and Available" Clause of the Immigration and Nationality Act by the Court of Appeals for the First Circuit Presents an Important Question of Federal Law That Has Not Been, But Should Be, Settled by This Court.

The district court in the case at bar stated that there must be a determination by the Regional Manpower Ad-

ministrator that there are sufficient workers in the United States who are "able, willing, qualified, and available" at the time of the application for labor certification. "Unless such a finding appears in the administrative record, an alien certification should not be denied under section 1182(a)(14)." In remanding to the district court, the Court of Appeals cited this lower court language with approval and noted that the Secretary's discretion should not be exercised on the "mere conclusory (possible irrelevant) statements" that 200 electrical engineers are listed in a registry maintained in Sacramento, California. The Court of Appeals thus rejected respondents' contention that the district court's interpretation placed an "unconscionable burden" on the Secretary of Labor (p. 13 of respondents' brief on appeal).

The statutory clause in question defines the boundaries of the Secretary's affirmative duty, as added by the 1965 amendments to the immigration statute. It is apparent, however, that the Secretary would prefer to define this duty very restrictively, as evidenced in the present case by a decision based on an extremely loose interpretation of "available", with no findings at all as to whether the alleged surplus engineers were "able", "willing", and "qualified" to fill petitioner Digilab's specific opening. Both courts below were unwilling to accept the Secretary's restrictive interpretation, as were at least two other district courts when faced with similar administrative attempts to apply only selective portions of the cause. *Bitang* v. *Regional Manpower Administrator*, 351 F. Supp. at 1345; *Golabek* v. *Regional Manpower Administration*, 329 F. Supp. at 895. In *Bitang*, the court held that communications from the State Employment Service, the only basis in the record for the Administrator's denials, could not support a determination that the persons listed fell within the federal standards of "able" or "qualified"

or that they were even still "available". In *Golabek,* the alien's motion for summary judgment was granted because the Administrator found that there might be "qualified" and "available" applicants, but not that those applicants would be "able" and "willing" to work for the specific employer.

The conflict thus for has been between the Department of Labor and the courts. For those courts which accept jurisdiction for purposes of judicial review, the resolution of the conflict is attempted through a finding of abuse of discretion, which may or may not result in the agency's interpretation upon remand coinciding with that of the reviewing court. In those jurisdictions where the Courts have held that judicial review is precluded because the statutory directive is permissive and purely discretionary, obviously the agency is free to interpret its duties as restrictively as it pleases, or not to perform the "duty" at all. Whether, the statutory language is to be viewed as guideposts or as a mandate (an issue which should itself be resolved by this Court), an interpretation as to the applicability of the various portions of the clause must be made by this Court to assure uniform treatment of an issue which has a significant bearing on the administration of our immigration laws. *Cf. Marcello* v. *Bonds,* 349 U.S. at 305.

Conclusion

This Honorable Court should grant certiorari not only for the relief of the petitioners herein but also to establish as to the multiplicity of labor certification cases and other matters entrusted to the discretion of federal administrative officials the effectiveness of the Administrative Procedure Act and to establish a doctrine of judicial review in cases where discretion has been abused.

Such a clear decision by this Honorable Court would aid immeasurably both those who are affected by the actions of administrative agencies and the orderly administration of the law with reference to the aforedescribed instances.

WHEREFORE, your Petitioners pray that this Petition be granted, that the decision of the Court of Appeals for the First Circuit be vacated and that the decision of the District Court below be affirmed.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 73-1244

DIGILAB, INC. and GUILLERMO FERLA,

APPELLEES,

v.

THE SECRETARY OF LABOR and
LAWRENCE W. ROGERS,

APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge*,
MOORE* and MCENTEE, *Circuit Judges*.

William A. Brown, Assistant United States Attorney, with whom *James N. Gabriel*, United States Attorney, was on brief, for appellants.
Joseph F. O'Neil, with whom *Peter L. Zimmerman* was on brief, for appellees.

March 22, 1974

MOORE, *Circuit Judge*. The Secretary of Labor and Lawrence W. Rogers, Regional Manpower Administrator [Boston area], defendants-appellants, appeal from an order of the United States District Court ordering them to issue an alien certification pursuant to 8 U.S.C. §1182(a)(14).[1]

*Of the Second Circuit sitting by designation.

[1] 8 U.S.C. §1182(a)(14) provides:
"Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient

Plaintiff Guillermo Ferla (Ferla) is a native of Uruguay who entered this country on August 14, 1970, to pursue his studies in the field of electrical engineering at Massachusetts Institute of Technology.

Plaintiff, Digilab, Inc. (Digilab), is a corporation doing business in Cambridge, Massachusetts, and engaged in the design, production and sale of analytical and biomedical instrumentation. Digilab had hired Ferla as a summer employee in 1971. Desirous of retaining Ferla's services thereafter, under date of October 26, 1971, Digilab filed an application for alien employment certification on behalf of Ferla (Form MA7-50B) for admission pursuant to 8 U.S.C. §1182(a)(14) together with a statement of Ferla's qualifications.

On November 15, 1971, the application was denied, notice thereof being given on a printed form with a check placed in paragraph 3 which stated: "Reasons: Available job market information will not warrant a certification of unavailability of workers in the U.S."

On January 13, 1972, Digilab resubmitted its application for Review to the Regional Manpower Administration (Boston) and presented detailed facts and documentation in support thereof.[2] This application was submitted to

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workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. . . ."

[2] "1. Our needs are highly specific and there are very few engineers who have the necessary training and experience.

As we have indicated in our applications, the job includes both design and test work on scientific equipment. The signals used cover the entire EM spectrum from audio to radio to optical frequencies. The applications of the equipment to be designed include IR spectroscopy, NMR and NQR spectroscopy, biomedical glaucoma detection, etc. The signal analysis is both analog and digital and requires both analog and digital experience.

the Reviewing Officer of the Manpower Administration and on January 31, 1972, Digilab was informed by the Reviewing Officer that the facts presented failed to produce sufficient grounds for reversing the November 15, 1971, decision. The Reviewing Officer offered the suggestion that Digilab "again contact the Massachusetts Division of Employment Security" in Waltham which could put it in contact with the National Registry for Engineers in Sacramento, California, which "reports an excess of over 200 Electrical Engineers ranging from B.A. up to and including Ph.D.'s."

On April 7, 1972, plaintiffs filed their complaint (with supporting documents) for a declaratory judgment that Ferla be granted the requested certification, alleging that the denial did not set forth findings of facts in conformity with the Administrative Procedure Act and was "arbitrary, an abuse of discretion and contrary to law."

On January 3, 1973, defendants moved to dismiss the complaint on the merits or in the alternative for summary judgment. This motion was denied. Thereafter plaintiffs

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The engineer we are looking for should know Fourier analysis, Laplace transform, RF signal detection, Bolean algebra and digital design, computer programs, digital systems, filtering, Z-transforms and circuit design.

His work will include the design and test of nuclear magnetic resonance and nuclear quadrupole resonance equipment, RF detection systems, digital systems, optical instrumentation. In addition to design and test, analysis of biomedical equipment is required, as is field service when necessary on the above equipment."

Paragraphs 2 through 7 of the resubmitted application for review are summarized as follows:

The application also included data concerning the academic background of Mr. Ferla; titles of academic articles; unsuccessful efforts to advertise the position and evaluation of some 75 responses from seven states; the difficulty of at least one other company in filling a specific engineering slot; and the key relationship of Ferla to governmentally sensitive work of Digilab's parent corporation.

filed their motion for summary judgment which was granted. From this order, defendants appeal.

The District Court filed two opinions. The first (February 1, 1973) was addressed to the denial of defendants' motion for judgment on the pleadings. The Court found that the listing of 200 electrical engineers did not "establish a necessary record of sufficient workers in the United States who are 'qualified', 'available', 'able' and 'willing'." Some six weeks after this decision, plaintiffs moved for summary judgment. In opposing this motion, in their memorandum of law defendants asked leave to file any necessary affidavits within three weeks. The record does not disclose any such filing.

In its second opinion (May 4, 1973), the Court held that there must be a determination by the Administrator that there are sufficient workers able, willing, qualified and available to Digilab; that there was no such finding; and that, therefore, there was no compliance with the express requirements of the statute. For these reasons, the Court granted plaintiffs' motion. For authorities the Court relied upon *Golabek* v. *Regional Manpower Administration*, 329 F.Supp. 892, 895 (D.C. Pa. 1971) and two unreported cases, *Farino, et al.* v. *Secretary of Labor, et al.*, and *Bitang, et al.* v. *Regional Manpower Administration*, both from the Northern District of Illinois, Eastern Division, Docket numbers, 71-C-2495 and 72-C-1099, respectively.[3]

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[3] Subsequent to the decision by the District Court in this case and the argument of this appeal, the Court of Appeals for the Seventh Circuit decided (December 19. 1973) the appeal in the *Farino, et al.* case (No. 71-C-2495). After holding that the case was reviewable by the Court of Appeals and that plaintiffs therein had standing to sue, the Court turned to the procedural aspects created by the somewhat conflicting facts and asked itself whether the issue should be tried "*de novo* in the district court, or whether the matter should have been remanded to the agency for further proceedings." *Secretary of Labor of the United States, et al.* v. *Phil Farino and Hoe Kow Cantonese Restaurant*, No. 73-1071, Seventh Circuit. In deciding which judicial policy to follow, the Court concluded "that in alien

This court is now called upon to reconcile two praiseworthy Congressional legislative objectives: (1) to admit and absorb into our citizenry skilled workers from other lands who would make a contribution to our society, and (2) to protect our own workers by excluding aliens whose entry might deprive our citizens of comparable jobs. The requirements for admission have been clearly stated in 8 U.S.C. §1182(a)(14). The alien shall be *ineligible* to receive a visa and shall be *excluded unless* the Secretary certifies that there are not sufficient workers in this country who are "able, willing, qualified, and available" at the place where the alien is destined to perform his labor.

The problem is easily stated; not so easily resolved. The Secretary argues in effect: How can I issue a certificate when the statistics show that there are hundreds of electrical engineers available with degrees ranging from B.S. to Ph.D.? Digilab answers that Ferla's position is unique; that it has examined resumes of many applicants and found them not qualified and as lacking the background required by Digilab.

Quite apart from labor statistics, the Secretary claims that he has the right to judge the good faith of the employer, the necessary qualifications for the job, and the mobility of engineers as a class. But just as the Secretary quite correctly argues that he should not be put in the position of running an employment office and have to recruit workers for various industries, so also, he should not have the privilege of determining the qualifications of any particular applicant for the job to be filled. Nor without proof, should he have the right to attack the good faith of an employer's personnel procedures.

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employment certification proceedings, remand to the agency is the better practice." In the event that defendants-appellants are unable to produce proof sufficient to satisfy the requirements of 8 U.S.C. §1182(a)(14), the District Court may issue such judgment as may be warranted under the circumstances.

In *Bitang, et al., supra,* the district judge found that the Secretary of Labor had "merely adopted the conclusory statement of the ISES that these plaintiffs' professions were listed as "surplus," and that his duty had not been fulfilled "through unexamined acquiescence in a state agency's ultimate conclusions." The judge remanded the action to the defendant [Regional Manpower Administrator of the United States Department of Labor] "for the making of further determinations" with respect to 8 U.S.C. §1182(a)(14).

Similar relief would seem appropriate here. The detailed enumeration of their job requirements and Ferla's qualifications to meet them (letter of January 13, 1972) are not adequately answered by the conclusory statement that some 200 electrical engineers are listed in a Registry maintained in Sacramento, California. "Electrical engineers" in this age of intense specialization is far too generic a term in determining whether any of them are qualified in the particular field required by Digilab. This was the conclusion of the district judge in his first opinion, namely, that this fact "does not in this court's eyes establish a necessary record of sufficient workers in the United States who are 'qualified,' 'available,' 'able' and 'willing.' " Significance may also be attributed to the failure of the defendants, after learning of Digilab's specific requirements and Ferla's qualifications to meet them, to submit further proof of the availability of engineers in such a restricted category.

However, the Secretary's discretion in this field entrusted to him by Congress is not lightly to be disregarded. On the other hand, this discretion should not be exercised on the mere conclusory (possibly irrelevant) statements given here.

Therefore, this action is remanded to the district court for a direction to defendants for a more specific factual basis for their decision.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 72-1217-F

DIGILAB, INC. ET AL.

v.

THE SECRETARY OF LABOR ET AL.

ORDER

February 1, 1973

FREEDMAN, D.J.

After due consideration of oral arguments heard on January 26, 1973 and written memoranda of law, the court ORDERS that defendants' motion for judgment on the pleadings be, and is denied. The court finds that plaintiff states a claim for relief, and that this court has jurisdiction to review an administrative determination where there is an alleged abuse of discretion. *Song Jook Suk* v. *Rosenberg*, 437 F.2d 1098 at 1102 (9th Cir., 1971).

After similar consideration of oral and written arguments, the court also denies defendants' alternative motion for summary judgment. On page 1102 in *Song Jook Suk, supra*, the court states that "abuse of discretion may be found only if there is no evidence to support the decision or if the decision is based on an improper understanding of the law. In the case at bar, the manpower administrator refused to issue certification required by 8 U.S.C. §1182 (a)(14) because "available job market information will not warrant a certification of unavailability of workers in the United States." Under said statute, certification must show "there are not sufficient workers in the United States who are able, willing, qualified and available at the time of application..." In *Golabek* v. *Regional Manpower*

Administration, 329 F. Supp. 892 at 895 (D.C.Pa., 1971), it was stated, "In addition, although the administrator found that there might be qualified and available applicants, there is nothing to indicate that those applicants would be 'able and willing' to work for..." There, the court subsequently granted a motion for summary judgment against the defendant Manpower Administration.

In the instant case, it appears that defendant has based his denial of certification on information received from the National Registry of Engineers in Sacramento, California, that there existed over two hundred electrical engineers in the country with degrees ranging from B.S.'s up to and including Ph.D.'s. However, the record does not reveal that the Manpower Administrator made a determination that there were those who were "willing and able" to accept a job with Digilab. The fact that a National Registry lists only two hundred possible qualified engineers in the entire country available for the job in question does not in this court's eyes establish a necessary record of sufficient workers in the United States who are "qualified", "available", "able" and "willing".

The court finds therefore that there could be substantial area for a determination of abuse of discretion on the part of the defendant and accordingly denies defendants' motion for summary judgment.

(s) FRANK H. FREEDMAN
District Judge

APPENDIX C

DIGILAB, INC. et al.
v.
The SECRETARY OF LABOR et al.

Civ. A. No. 72-1217.

United States District Court,
D. Massachusetts.

May 4, 1973.

Joseph F. O'Neil, Boston, Mass., for plaintiffs.
Joseph L. Tauro, U.S. Atty., Frederic Kellogg, Asst. U.S. Atty., for defendants.

OPINION

FREEDMAN, District Judge.

This action is before the Court on plaintiffs' motion for summary judgment seeking a declaratory judgment under 28 U.S.C. § 2201 and judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 704, 705 and 706 of the Regional Manpower Administrator's denial of labor certification. Plaintiff, Guillermo Ferla, had been offered and accepted employment with the plaintiff, Digilab, Inc., but the Manpower Administrator denied plaintiffs' application for certification. Defendants' motion for summary judgment and judgment on the pleadings has previously been denied by this Court in an order dated February 1, 1973.

After due consideration of oral arguments heard on April 13, 1972 and study of the memoranda of law supplied by the parties and the pleadings to date, the Court finds that there is no genuine issue of material fact in dispute and that the case is thereby ripe for summary judgment.

[1] In previously denying defendants' motion for judgment on the pleadings, this Court ruled that it did have jurisdiction to review an administrative determination where there is an alleged abuse of discretion. Song Jook Suh v. Rosenberg, 437 F.2d 1098 (9th Cir., 1971). On page 1102, the Court states, "Abuse of discretion may be found if there is no evidence to support the decision or if the decision is based on an improper understanding of the law."

[2] In applying this test to the instant case, the Court finds that defendant Manpower Administrator has abused his discretion. The term "no evidence" as stated in Song Jook Suh v. Rosenberg, *supra,* cannot be interpreted to mean "any" evidence, no matter how little. It must be interpreted to mean evidence sufficient to satisfy what Congress has mandated in 8 U.S.C. § 1182(a)(14). That is, that there must be a determination by the Administrator that there are sufficient workers in the United States who are "able", "willing", "qualified" and "available" at the time of the application. Unless such a finding appears in the administrative record, an alien certification should not be denied under § 1182(a)(14)(A).

[3] The administrative record in the case at bar indicates no more than that the determination was based on a listing in California of 200 electrical engineers. Nowhere does the record indicate that these 200 engineers were "able", "willing", "qualified" and "available" to the plaintiff corporation. The Court finds that the actions of the Administrator were not in compliance with the express requirements of the statute. Golabek v. Regional Manpower Administrator, 329 F.Supp. 892 at 895 (D.C.Pa., 1971).

Two recent cases are in point with the position taken in this matter by this Court. Farino et al. v. Secretary of Labor et al., Decision and Order, U.S.D.C., N.D. of Illinois (E.Div.), No. 71-C-2495, and Bitang et al. v. Regional

Man-Power Administrator, Memorandum of Decision, U.S. D.C., N.D. of Illinois (E.Div.), 351 F.Supp. 1342.

For reasons mentioned aforesaid, the Court orders that plaintiffs' motion for summary judgment be allowed and that the defendants issue the requested alien certification to plaintiff Ferla pursuant to 8 U.S.C. § 1182(a)(14).

APPENDIX D

STATUTES

5 U.S.C., Ch. 7, § 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

5 U.S.C., Ch. 7, § 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

5 U.S.C., Ch. 7, § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of

law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

8 U.S.C., Ch. 12, § 1182. Excludable aliens—General classes

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States...

(14) Aliens seeking to enter the United States,

for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 1101(a)(27)(A) of this title (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in sections 1153(a)(3) and 1153(a)(6) of this title, and to nonpreference immigrant aliens described in section 1153(a)(8) of this title....

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1904

DIGILAB, INC. AND GUILLERMO FERLA, PETITIONERS

v.

SECRETARY OF LABOR AND LAWRENCE W. ROGERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners contend that the court of appeals erred in remanding the case so that respondents could supply a more specific factual basis for their denial of petitioner's application for an alien labor certification under 8 U.S.C. 1182(a)(14).

1. Petitioner Guillermo Ferla is a native of Uruguay who entered this country as a student and now seeks to become a special immigrant under 8 U.S.C. 1101 (a)(27)(A) for the purpose of taking a job as an electrical engineer with Digilab, Inc., a corporation doing business in Massachusetts.

Before an alien in the position of petitioner Ferla may obtain special immigrant status for the purpose of employment, the Secretary of Labor must certify to the Secretary of State and the Attorney General, pursuant to 8 U.S.C. 1182(a)(14), that (A) there are not

sufficient workers in the United States who are able, willing, qualified, and available for the job which the alien has been offered, and (B) that the alien's employment will not adversely affect the wages and working conditions of similar workers in the United States.

The Secretary of Labor has delegated his power to issue labor certifications to the office of the Manpower Administration for the area wherein the employment is to occur. 29 C.F.R. 60.4(a). For aliens in the circumstances of petitioner, application must first be made to the State Employment Service, which evaluates the market for people qualified to fill the job in question; the State Employment Service forwards its report and information to the office of Manpower Adminstration. 29 C.F.R. 60.3(c). A certifying officer appointed by the Regional Manpower Administrator makes the inital determination based on the State Employment Service's report and other available information. 29 C.F.R. 60.4(a). Appeal from the certifying officer's determination lies to the Regional Manpower Administrator or a designated reviewing officer, whose determination is final. 29 C.F.R. 60.4(c).

Pursuant to these procedures, petitioners made application for labor certification to the Massachusetts Division of Employment Security on October 26, 1971, and on November 8, 1971, the Division advised that there were United States workers who were available for this position (Pet. 4). On November 15, 1971, the certifying officer of the Regional Manpower Administration denied labor certification and informed petitioners of its decision (Pet. App. A 17). The reason given for the decision was that United States' workers were available. On January 13, 1972, petitioners resubmitted their application to the Regional Manpower Administration,

presenting detailed facts and documentation in support of their application *(ibid.)*. On January 31, 1972, the reviewing officer upheld the decision of the certifying officer (Pet. App. A 18).

On April 7, 1972, petitioners filed a civil action against the Secretary of Labor and the Regional Manpower Administrator in the United States District Court for the District of Massachusetts seeking review of the decision of the Regional Manpower Administrator. The district court granted petitioners' motion for summary judgment and ordered that respondents issue the requested labor certification. In its opinoin (Pet. App. C 24), the district court held that 8 U.S.C. 1182(a)(14) required a determination by the Administrator that there are sufficient workers "able", "willing", "qualified", and "available" to Digilab, and that, because there was no such finding, there was insufficient evidence in the record to support the denial of certification.

Upon appeal by the Secretary of Labor, the First Circuit remanded the case to the district court for a direction to respondents for a more specific factual basis for their decision. The court stated its reasons as follows (Pet. App. A 21):

> The detailed enumeration of their job requirements and Ferla's qualifications to meet them (letter of January 13, 1972) are not adequately answered by the conclusory statement that some 200[1] electrical engineers are listed in a Registry maintained in Sacramento, California. "Electrical engineers" in this age

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[1]We have been informed that this statement was in error and should have read that in excess of 2,000 electrical engineers were listed in the Registry.

of intense specialization is far too generic a term in determining whether any of them are qualified in the particular field required by Digilab. This was the conclusion of the district judge in his first opinion, namely, that this fact "does not in this court's eyes establish a necessary record of sufficient workers in the United States who are 'qualified,' 'available,' 'able' and 'willing.' " Significance may also be attributed to the failure of the defendants, after learning of Digilab's specific requirements and Ferla's qualifications to meet them, to submit further proof of the availability of engineers in such a restricted category.

However, the Secretary's discretion in this field entrusted to him by Congress is not lightly to be disregarded. On the other hand, this discretion should not be exercised on the mere conclusory (possible irrelevant) statements given here.

2. The decision to remand was appropriate, and will best serve to permit the reconciliation of the twin legislative objectives which Congress sought to attain when it enacted 8 U.S.C. 1182(a)(14), *viz.*, (1) the admission into our country of skilled workers who would make a contribution to our society, and (2) the protection of our own workers who are available for employment in comparable jobs. This remand procedure has been generally followed, as petitioners concede (Pet. 11). *Secretary of Labor* v. *Farino*, 490 F. 2d 885, 891-892 (C.A. 7); *Guinto* v. *District Director of the United States Immigration and Naturalization Service*, 303 F. Supp. 1094 (C.D. Cal.), affirmed, 446 F. 2d 11 (C.A. 9); *Bitang* v. *Regional Manpower Administrator*, 351 F. Supp. 1342 (N.D. Ill.); *Ozbirman* v. *Regional*

Manpower Administrator, 335 F. Supp. 467, 472-473 (S.D. N.Y.).[2] It would have been inappropriate for the court of appeals to decide this case on the basis of the record before it, which it considered to be inadequate. Cf. *Public Affairs Associates, Inc.* v. *Rickover*, 369 U.S. 111, 113-114.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

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[2]In *Golabek* v. *Regional Manpower Administration*, 329 F. Supp. 892 (E.D. Pa.), cited by petitioners (Pet. 11-12), there was no need to remand because the record was complete; the court merely held that the administrator had made an error of law in defining the job market in which to compare wage scales. 329 F. Supp. at 894-896. The instant case was remanded so that the respondents could enter their factual basis for denial for certification in the record, not because of an error of law.

DOL-1974-09